86 - 1062

No.____

IN THE
SUPREME COURT OF THE UNITED STATES

Term, 19

DOROTHY E. DREYER,
Petitioner

v.

ARCO CHEMICAL COMPANY
A DIVISION OF,
ATLANTIC RICHFIELD COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1. Did the Third Circuit Court of Appeals err in requiring that an Age Discrimination In Employment Act plaintiff prove that the conduct of the employer was "outrageous" in order to be entitled to an award of liquidated damages?

PARTIES TO THIS PROCEEDING IN THE COURT BELOW

This action, as filed in the United States Court of Appeals for the Third Circuit, was styled *Dorothy E. Dreyer and Naomi D. Strayer, Appellees v. ARCO Chemical Company, a division of Atlantic Richfield Company, Appellant,* at No. 85-3476.

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OPINION BELOW

The United States Court of Appeals for the Third Circuit issued an Opinion and Order on September 22, 1986. The Opinion, written by Circuit Judge Sloviter, is published in 801 F.2d. 651. No opinion was rendered by the United States District Court for the Western District of Pennsylvania.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1), wherein it is provided, *inter alia*, that cases in the Courts of Appeals may be reviewed by the Supreme Court by Writ of Certiorari granted upon the Petition of any party to any civil or criminal case before or after rendition of judgment or decree.

Petitioner, Dorothy E. Dreyer, seeks review of that portion of the Order issued and entered by the United States Court of Appeals for the Third Circuit on September 22, 1986, which reverses the jury's finding of a willful violation of the Age Discrimination In Employment Act, and the award to Dreyer of liquidated damages as provided in the Act.

STATUTES INVOLVED IN THIS CASE
TITLE 29, LABOR
SECTIONS 621, 623 and 626

§621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that—

(1) In the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment and especially to regain employment when displaced from jobs;

(2) The setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) The incidence of unemployment, especially long-term unemployment with resultant deterioration skill, morale, and employer acceptability is relevant to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) The existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce;

(b) It is therefore the purpose of this Act [29 U.S.C.S. §§621 et seq;] to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination and employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment;
(Dec. 15, 1967, P.L. 90-202, §2, 81 Stat. 602.)

§623. Prohibition of age discrimination

(a) Employer practices. It shall be unlawful for an employer —

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age;

(2) To limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's age; or

(3) To reduce the wage rate of any employee in order to comply with this Act [29 USCS §§621 et seq.].

§626. Recordkeeping, investigation and enforcement.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference and persuasion.

The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in Sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 USC §211(b), 216, 217) [29 USCS §§211(b), 216, 217] and subsection (c) of this section. Any act prohibited under section 4 of this Act [29 USCS §623] shall be deemed to be a prohibited act under Section 15 of the Fair Labor Standards Act of 1938, as amended (29 USC 215) [29 USCS §215]. Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of Sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 USC 216, 217) [29 USCS §§216, 217]: Provided, That liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect a voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

(Dec. 15, 1967, P.L. 90-202, §7, 81 Stat. 604; Apr. 6, 1978, P.L. 95-256, §4(a), (b)(1), (c)(1), 92 Stat. 190, 191.)

STATEMENT OF THE CASE

Petitioner, Dorothy E. Dreyer (hereinafter "Dreyer") and Naomi Strayer (hereinafter "Strayer") instituted a civil action alleging a violation of the Age Discrimination In Employment Act, Title 29, U.S.C. §§621, et seq., (hereinafter "ADEA") in the United States District Court for the Western District of Pennsylvania against the ARCO Chemical Company (hereinafter "ARCO") on August 10, 1983.[1]

The case, docketed as Civil Action No. 83-2001, was tried before a jury and presided over by the Honorable Alan N. Bloch, United States District Judge. The jury returned a verdict in favor of the plaintiffs below, finding that ARCO had discriminated against Dreyer and Strayer because of their age in violation of Title 29, U.S.C. §623(a)(1).

The jury awarded $66,043.99 in back pay to Strayer and $68,367.75 to Dreyer based upon the parties' stipulation as to damages. The jury further found that ARCO had "wilifully" discriminated against Dreyer as that term has been defined by the ADEA and the United States Supreme Court and awarded her liquidated damages in an amount of her backpay, Title 29, U.S.C. §626(b), for a total award to Dreyer of $136,725.50.

Following the denial of ARCO's Motion For Judgment Notwithstanding the Verdict, ARCO filed a timely Appeal to the Third Circuit Court of Appeals. The Appellate Court, in an Opinion by Circuit Judge Dolores K. Sloviter, affirmed the denial of ARCO's Motion For Judgment Notwithstanding the Verdict insofar as it upheld the jury's finding of liability to Dreyer and Strayer, and the assessment of compensatory damages to the plantiffs below. The Court of Appeals, however, reversed the District Court's Order upholding the jury finding that ARCO acted willfully in discharging Dreyer.

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1. Naomi D. Strayer is not a party to the instant Petition.

The evidence presented at trial established that both Dreyer and Strayer were long-term employees of the Beaver Valley Plant of ARCO Chemical Company or its predecessor companies, Dreyer having been employed since 1959 and Strayer since 1963. Due to adverse economic conditions and a corporate reorganization, ARCO had determined to reduce and consolidate its work force throughout its system. Both Dreyer and Strayer were at that time employed in the Financial Controls Department at the Beaver Valley plant. ARCO's plan to reduce its employment force resulted in its establishing a goal of reducing the number of employees in that department from 26 to 18.

In an effort to reduce the number of employees, ARCO implemented an ostensibly voluntary early retirement program, whereby those persons over the age of 55, with 15 or more years of service in the company, who were not eligible to retire under the terms of the regular retirement plan would receive some additional severance benefits. At this time, both Dreyer and Strayer were over the age of 55 and thus eligible for inclusion in the Special Early Retirement program. Both decined to avail themselves of this "voluntary" opportunity, however, whereupon they were advised that if they did not retire, they would be summarily discharged from employment. Threatened with the reality of losing their retirement benefits, Dreyer and Strayer accepted early retirement under memoralized protest.

In the midst of this reduction in force, however, certain employment opportunities within the Beaver Valley Plant remained for which both parties' witnesses established Dreyer was clearly qualified. ARCO's witnesses testified that they knew Dreyer was more qualified than those individuals who filled the Senior Accounting Clerk and Senior Payroll clerk positions, and that further Dreyer was qualified for the computer operator job, ultimately given to a younger woman. While Dreyer's supervisor claimed that he had forgotten about her training

in the Data 100 Computer System, the jury could and did come to the conclusion that ARCO had refused to consider Dreyer for the position because of her age, and that the reasons given for denying Dreyer continued employment were mere pretext.

The jury also heard testimony which established that those employees who accepted early retirement under ARCO's plan were arbitrarily denied consideration for reinstatement in any form, while those employees under age 55 were to be considered layoffs subject to recall. ARCO undertook no individual employee evaluations in its effort to reduce its staff but instead simply targeted those persons over age 55 for the Special Early Retirement Program. In fact, all of those eliminated from the financial controls department were over 55 years of age.

The decision to terminate Dreyer, despite her obvious and admitted qualifications, was made despite ARCO's admission that all of those involved in implementing the reduction in force plan were well aware of the responsibilities of the company under the ADEA (29 USCA §§621, et seq.). The jury, properly instructed pursuant to the *Trans World Airline, Inc. v. Thurston,* 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed 2d. 523 (1985) standard for willfulness, returned a verdict in favor of Dreyer, finding that ARCO's discharge of Dreyer was not only willful, but "malicious."

The Third Circuit Court of Appeals, while finding no error in the jury determination of liability, nor the Court's instruction to the jury on the issue of willfulness, reversed the award of liquidated damages to Dreyer based upon its opinion that a willful violation of the Age Discrimination In Employment Act must involve outrageous conduct on the part of the employer.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

Petitioner respectfully represents that this Court should exercise its sound judicial discretion and grant Petitioner's Petition for Writ of Certiorari for the following reasons:

The Opinion and Order of the United States Court of Appeals for the Third Circuit, reversing the award of liquidated damages to Petitioner, is contrary to the general principles enunciated by this Court.

The United States Court of Appeals for the Third Circuit has created a standard for the willful violation of the Age Discrimination In Employment Act that is in conflict with a recent dicision by this court, and is also in conflict with each of the other United States Courts of Appeals that have had occasion to examine this standard.

While this Court has determined that a showing of a willful violation of the ADEA can be made by demonstrating that the employer either knew or showed a reckless disregard for whether its conduct was prohibited by the Act, the United States Court of Appeals for the Third Circuit redefined this standard to require that an ADEA plaintiff prove outrageous conduct by the defendant in order to be entitled to liquidated damages. This element places a burden upon a plaintiff in an age discrimination case which far exceeds that contemplated by Congress when the statute was enacted.

Further, the reason given by the United States Court of Appeals for the Third Circuit in refusing to apply the standard of willfulness as recently enunciated by this Court, was that the "knew or showed reckless disregard" standard was inapplicable to a case involving "disparate treatment in a discrete employment situation." Neither this Court nor any of the other Circuit Courts throughout the United States makes a distinction in applying this

Court's standard for willfulness, and apply the *Thurston* standard in cases of both disparate impact and disparate treatment.

This case presents an important issue in the field of civil rights litigation, which the Petitioner respectfully submits should be addressed and clarified by this Honorable Court.

ARGUMENT

I. THE THIRD CIRCUIT COURT OF APPEALS ERRED IN ADOPTING A DEFINITION OF WILLFULNESS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT WHICH SAID DEFINITION IS IN DIRECT CONFLICT WITH THE APPLICABLE DECISION OF THE UNITED STATES SUPREME COURT.

A. GENERAL PRINCIPLES ENUNCIATED BY THE SUPREME COURT.

Title 29, Section 626(b), provides in pertinent part that, "liquidated damages shall be payable only in cases willful violations of [the Age Discrimination In Employment Act]" (29 USC §§621 et seq.). That same subsection also provides that the Age Discrimination in Employment Act, "shall be enforced in accordance with the powers, remedies and procedures provided in the Fair Labor Standards Act (29 USC §§201, et seq.)" While the ADEA specifically provides that the criminal penalties imposed pursuant to Section 16(a) of the FLSA (29 USC §216(a)) will not be imposed upon an employer found to have violated the ADEA, the United States Supreme Court in *Trans World Airline, Inc. v. Thurston,* 469, U.S. 111, 105 S.Ct. 613, 83 L.Ed 2d. 523 (1985) has held that, "The manner in which FLSA Section 16(a) has been interpreted," is nevertheless relevant in determining the definition of a willful violation of the ADEA. *Thurston,* 105 S. Ct. at 624.

In the *Thurston* case, this Court was called upon to determine whether a policy adopted by TWA which discriminatorily impacted upon pilots 60 years of age or older was a willful violation of the ADEA, thus entitling the pilot plaintiffs to liquidated damages. This Court, in reversing the Second Circuit Court of Appeals decision to award the pilots liquidated damages, held that a violation of the ADEA is willful when the employer either knew or showed a reckless disregard for the matter of whether its conduct is prohibited by the ADEA. The *Thurston* Court specifically rejected the "in the picture" standard engendered by *Coleman v. Jiffy June Farms, Inc.*, 458 F. 2d 1129 (5th Cir. 1971), holding that Congress envisioned a two-tiered liability scheme whereby only those employers found to have willfully violated the provisions of the ADEA will be subject to the liquidated damages delineated in the statutes.

This Court made no distinction between cases in which a policy, neutral on its face, nevertheless impacts discriminatorily upon those persons protected under the ADEA, and those cases in which an individual member of the protected class is subject to an act of discrimination specifically directed at that individual. *Thurston* further held that an employer has a defense to an award of liquidated damages when it can show good faith and reasonable grounds for believing that it was not in violation of the ADEA. 105 S.Ct. at 625.

It is petitioner's position that the Third Circuit Court of Appeals erred in holding that the standard of willfulness enunciated by this court in *Trans World Airline, Inc. v. Thurston*, 105 S.Ct. 613 (1985) does not apply to disparate treatment cases brought under the ADEA. Whether this Court nor any other United States Court of Appeals has recognized nor made this distinction. The Court of Appeals further erred when it required Petitioner to prove outrageous conduct by the employer before she would be entitled to liquidated damages.

B. APPLICATION OF THOSE PRINCIPLES TO THIS CASE

1. *The Instant Case in Fact Involved the Application of a Policy, as in Thurston, not merely the Direction of a Decision at an Individual.*

The Third Circuit, in its opinion in this case, held that the "knew or showed reckless disregard" standard enunciated by this Court in *Thurston* was inappropriate in a case in which the alleged discriminatory conduct consisted of an action directed at an individual, although it would be appropriate in a case in which the discriminatory conduct consisted in the implementation of a policy impacting on a group.

No other United States Circuit Court of Appeals has rendered an opinion in a disparate treatment case under the ADEA in which it recognized any such distinction. See *Wilhelm v. Blue Bell, Inc.*, 773 F.2d. 1429 (4th Cir. 1985); *Galvin v. Bexar County, TX*, 785 F.2d. 1298 (5th Cir. 1986); *Williams v. Caterpillar Tractor Company*, 770 F.2d. 47 (6th Cir. 1985); *Matthews v. Allis-Chalmers*, 769 F.2d. 1215 (7th Cir. 1985); *Gilkerson v. Toastmaster, Inc.*, 770 F.2d. 133 (8th Cir. 1985); *Smith v. Consolidated Mutual Water Company*, 787 F.2d. 1441 (10th Cir. 1981); *Archambault v. United Computing Systems, Inc.*, 786 F.2d. 1507 (11th Cir. 1986). In none of the above cited disparate treatment cases was there any acknowledgement that the *Thurston* standard was limited in application to disparate impact cases.

Even if the Third Circuit's distinction here were valid, however, the instant case is *not*, as that Court suggests, a case in which the action of the employer is a decision directed at an individual. The claim of Petitioner here, in fact, is closer in kind to the *Thurston* case. Petitioner's claim clearly arises, not in the context of a decision directed at an individual but as the consequence of the adoption of a *policy*, to-wit, the forced retirement of

persons over 55 years of age as a means of accomplishing a reduction-in-force. In implementing that policy, the evidence showed, as indicated below, that the Respondent, as a matter of *policy*, made a discriminatory distinction between persons under 55 who accepted a special early *termination* and were eligible to be rehired, and those over 55 who accept special early *retirement* and were ineligible to be rehired. In the further implementation of that policy, the evidence showed that the Respondent intentionally and knowingly retained younger employees and assigned them to jobs for which they had no prior training and experience while forcing the early retirement of older employees who were known to be qualified to perform the work for which the untrained employees had been retained. Finally, the evidence showed that the implementation of the policy was facilitated by the creation of false and artificially low performance evaluations for the two employees who accepted retirement only under protest and only after they were threatened with immediate termination if they did not accept the policy of Special Early Retirement. Such a course of conduct so clearly evidences evil motive or bad purpose that it would seem to preempt the necessity for a discussion of the "knew or showed reckless disregard" standard. Nevertheless, applying the "knew or showed reckless disregard" standard of *Thurston* to these facts clearly justified a jury verdict of willfulness. The attempt by the Respondent to convince the jury that it acted in a good faith with respect to Petitioner Dreyer was resoundingly rejected.

2. *Where the Evidence Supports the finding that the Employer Acted in Bad Faith and with an Evil Purpose, the Distinction Between Disparate Treatment and Disparate Impact Cases is Unsupportable.*

In addition to proving that age was a determinative factor in the decisions to terminate her employment by

forcing her to accept retirement, the Petitioner must, according to the Third Circuit, also prove that the employer engaged in conduct which a jury could reasonably conclude was "outrageous."

In effect, the Third Circuit has engrafted upon the ADEA the Pennsylvania tort law standard for punitive damages. There is not one iota of evidence, however, that Congress intended such a consequence when it made the civil penalty provisions of the Fair Labor Standards Act applicable to ADEA violations.

There is no evidence that Congress intended anything more than to apply to employer conduct general principals relating to criminal culpability without, however, applying the criminal penalties of incarceration and fine. This Court recognized as much when it applied the standards of willfulness set forth in *United States v. Murdock*, 290 U.S. 389 (1933), a misdemeanor criminal case involving the willful failure to pay a tax due.

Clearly, neither a taxpayer's "failure to do various things thought to be requisite to a proper administration of the income tax law," *United States v. Murdock*, 290, U.S. 389, 397 (1933) nor a carrier's negligently failing to unload cattle from a railroad car, *United States v. Illinois Central Railroad Company*, 303 U.S. 239 (1938) are examples of "outrageous conduct," although equally clearly they justified the imposition of a civil punitive remedy, according to this Honorable Court.

Where, as here, an ADEA plaintiff has proven that an employer, well aware of its obligations under the ADEA, implements an involuntary retirement *policy* which denies re-employment to those forced to accept it, knowingly and intentionally denies jobs to older person who are qualified to take them while giving those same jobs to younger persons who are patently unqualified then falsifies both evaluations and trial testimony to justify its actions, the finding of willfulness is warranted. Neither this Court in the *Thurston* decision or any other United States Circuit Court of Appeals having occasion

to examine the issue of willfulness following the *Thurston* decision, has seen fit to create a different standard, nor add such an onerous element as "outrageousness." *EEOC v. Prudential Savings & Loan Association*, 763, F.2d. 1166 (10th Cir. 1985); cert. den. 106 S.Ct. 312 (1985). *Powell v. Rockwell International Corporation*, 788 F.2d. 279 (1986); *Wilhelm*, Supra; *Galvin*, Supra; *Williams*, Supra.; *Matthews*, Supra.; *Gilkerson*, Supra.; *Smith*, Supra.; *Archambault*, Supra.

3. *The Facts Proved in the Instant Case Were Sufficient to Support a Jury Finding of Willfulness in the Criminal Sense of the Word and in the Sense of Bad Faith or Evil Motive.*

This Court, in *Thurston*, relied upon interpretations of the word "willful" as set forth in a case involving criminal conduct. Cf. *United States v. Murdock*, 290 U.S. 389 (1933). The *Murdock* case involved the misdemeanor failure to pay a tax due, hardly the kind of conduct one would consider outrageous.

Accordingly, Petitioner contends that her evidence would have been sufficient to convict the Respondent of criminal conduct if intentional age discrimination were a crime. The evidence was more than sufficient to justify a jury finding that ARCO's termination of Petitioner was undertaken in bad faith and with evil motive and therefore deserving of punishment.

The evidence clearly supports the conclusion that ARCO intended to accomplish its reduction-in-force through the terms of a so-called voluntary early retirement plan applicable to persons 55 years of age or older with 15 years of service with the company (Joint Appendix p. 455). Accordingly, ARCO *specifically* targeted persons in the protected age group for termination (J.A., pp. 222-223). The jury could legitimately conclude that the company valued the abilities of its older workers less than its younger workers or it would have accomplished

its cutback following a thorough review of individual qualifications, abilities and performance.

In short, the jury could conclude that ARCO's policy of termination was targeted in terms of age.

The jury could further conclude that ARCO's motive was to discriminate against persons over 55 by comparing how they were treated to treatment accorded persons *under* 55 who were terminated under the so-called "Special *Termination* Plan." While persons under 55 were eligible to be rehired (J.A., p.p. 435-436), no re-hire provisions were contained in the Special Retirement Plan. Even if jobs later became available, therefore, persons whose jobs were terminated under the "Special Retirement Plan" could not take them while the younger employees could (J.A., p. 80).

Although ARCO claimed that the retirement plan was strictly "voluntary," the jury could conclude from the evidence that it was in fact not voluntary and that the employees who accepted it did so either because they were forced to, like Dreyer and Strayer, or that they did so because they were encouraged to do so as a result of unreasonable time pressure, incomplete information and hints by management that they were no longer considered useful employees.

With regard to Dreyer and Strayer, of course, the testimony was clear. Neither of them wished to retire. They accepted early retirement only because they had to. Accordingly, their retirement cannot be said to have been voluntary in any sense of the word. (J.A., pp. 81-82, 156).

A jury might be justifiably suspicious of the motives of a company which deliberately identifies a group of persons because of their age (over 55), makes them the first targets of the RIF (J.A., pp. 222-223. 455) and threatens them with firing if they refuse to retire.

A jury, equally suspicious, could legitimately ask why a company under economic pressure would want to get rid of its most experienced and loyal employees, even if it had to reduce its force.

The jury was aware that ARCO had done an age analysis (J.A., p. 466) and that ARCO knew that it had an "old" work force at the Beaver Valley Plant (J.A., p. 485). ARCO thus evidenced a motive to discriminate although such motive would not be necessary to support a criminal conviction.

The jury also knew that ARCO had evidenced a desire *not* to rehire employees 55 or older while indicating its willingness to rehire employees younger than 55 (J.A., pp. 80, 435-436).

The jury knew also that no employee evaluations and comparisions had been done prior to the initiation of the early retirement program. (J.A., pp. 227-228, 445, 478, 479).

The jury could conclude, therefore, that ARCO had evidenced a strong motivè to get rid of its older employees, regardless of their qualifications and abilities.

The jury could further conclude that ARCO pressured these employees into making a quick decision without complete information.

Although ARCO knew of the reduction in the summer (J.A., pp. 338, 451), it was not until November 9, 1981, that it announced the availability of the retirement plan (J.A., pp. 458-469), and then told the potential retirees they had to decide by December 1, 1981 (J.A., p. 469) when the deadline was actually January, 1982 (J.A., p. 446). ARCO did not advise the employees which jobs would be eliminated, or which consolidated and new jobs might be available after the reorganization (J.A., p. 477). They were given no opportunity to compete for the available jobs although ARCO permitted employees to bid after Strayer and Dreyer had been forced to retire (J.A., p. 404).

ARCO's witness Faulhaber admitted that at no time did he make any review of the histories of the retirees and made no effort to determine whether they were valuable, qualified or competent individuals (J.A., p. 228).

The jury could conclude that persons 55 years old or older were forced to retire even though there were job slots under the new organization that were not filled.

Defendants' Exhibit 26 (J.A., p. 551), shows a secretarial slot open even though Strayer had been terminated and could have performed it. The exhibit further shows openings for a senior accounting clerk and a senior payroll clerk, either of which jobs Dreyer could have taken and for which she had prior experience (J.A., pp. 40-41), as Hines admitted that he knew (J.A., p. 404).

The jury could conclude that ARCO intentionally retained under-55 employees in job slots for which they had no prior experience or training while forcing older employees with such experience and training to retire.

ARCO's Exhibit 26 (J.A., p. 551) shows that Marlea Roser was slotted to become an accounting clerk after the reorganization. Larry Fink testified that he did not know how Marlea Roser became an accounting clerk (J.A., p. 314). Hines admits that Roser had never been an accounting clerk before (J.A., p. 398). She had been a secretary and telephone operator (J.A., p. 397). Marlea Roser, Hines conceded, was simply one of the people who was left after the others were terminated (J.A., p. 398) and was a 3-minus (less than satisfactory) employee to boot (J.A., p. 399).

Mary Ann Vlasic, according to Defendant's Exhibit 26, was slotted in as a senior data entry clerk (J.A., pp. 551 and 715). Vlasic had been the mailroom clerk (J.A., p. 399). One percent of her job involved data entry (J.A., p. 400). Vlasic's performance for 1981 was a 3-minus (Plaintiff's Ex. 701, J.A., pp. 401, 718). Vlasic was 48 in January, 1981 (J.A., p. 188). Hines also testified, erroneously, that Dreyer had no Data training (J.A., p. 402) although he had previously acknowledged in a letter that she had been well-trained on the hardware and the Data 100 software (J.A., p. 90).

Accordingly, the jury could conclude that ARCO deliberately conducted its reorganization to eliminate persons over 55 even though there were jobs available for which they were qualified.

While Dreyer and Strayer offered no expert statistician, the data that was offered and from which the jury could draw their own conclusions, confirmed an intentional pattern.

Faulhaber testified that ARCO needed to reduce the number of people in the financial controls department by eight (J.A., p. 209).

He further admits that of the eight people eliminated from a department of 26, *all* were 55 or older.

Hines testified that in his department before the cutback, there were 13 people over 50. After the cutback only 6 people were over 50 (J.A., p. 351).

Hines further testified on cross-examination that for the year 1981, he performed annual salary adjustments for the employees under his supervision (J.A., p. 380). Those increases were recorded on Plaintiff's Exhibit 299 (J.A., p. 701). Those salary actions were to become effective in August of 1981, the summer that the RIF was initiated (Id).

Of the 21 employees listed, the salary increases ranged from 6 to 12 percent.

Of the 21 employees listed, seven were 55 or over, but only one, Hazy, got more than 6 percent. He got 8 percent. Every other person 55 or over, according to Hines' testimony, received the *minimum* of 6 percent (J.A., p. 381). No person under 55 received the minimum (J.A., p. 382). Was ARCO trying to get the message across to persons 55 or over that they could not expect to receive merit increases and that they were in danger of losing their jobs? Although they were all satisfactory employees, they got the same minimum percent increase as Strayer, who Hines claimed was a 4 (see heading "PC" on J.A., page 701).

These data, therefore, though not interpreted by a statistician, could well support a jury's conclusion that ARCO engaged in intentional conduct.

Finally, the jury could conclude that the credibility of ARCO's witnesses, particularly Fink and Hines, was so bad that the jury was justified in disbelieving anything they said and could conclude that they were attempting to cover up unlawful conduct.

Fink testified that Dreyer had never been trained on the Data 100. When confronted with her Data 100 training certificate, however, he claimed he forgot about it. (J.A., p. 296).

Further, Fink tried to convince the jury that Dreyer was a 3-minus performer but had to admit on cross-examination that he had marked her lower than she had deserved in a least two specific categories (J.A., pp. 306-307).

ARCO failed to call as a witness Marva Allen, the supervisor, who had given Dreyer a 3-minus for 1981 under circumstances in which she, Allen, knew a RIF was coming and that her duties and Dreyer's were redundant. The jury could construe this glaring failure as a failure by ARCO to substantiate its 1981 performance review of Dreyer.

Fitzpatrick, the plant manager, testified that cutbacks were necessary because the plant had to reduce its population because it was higher than quota. He admitted on cross-examination, however, when confronted with documentary evidence to the contrary, that the plant was already beneath quota in January, 1982, when the terminations of Dreyer and Strayer occurred (J.A., pp. 502-503).

Faulhaber testified that ARCO's employee relations department was *well aware* of the company's obligations under age discrimination statutes (J.A., p. 222). Assuming that to be the case, a jury could conclude that

ARCO's attempt to manufacture false reasons for termination evidenced ARCO's knowledge that its activities were unlawful.

In sum, the jury had ample evidence from which to conclude that ARCO *intentionally* targeted persons 55 or older to bear the burden of a RIF and carried out the reduction by forcing people to retire even though they did not want to do so and even though they were qualified to perform available jobs.

The evidence shows classic elements of criminal culpability: a known motive, a scheme to identify the employees in the specific age bracket over 55, a deliberate plan to eliminate them from positions for which they were known to be qualified while using employees known not to be qualified for those positions, an attempt to falsify the record as to qualifications and an effort to conceal wrongdoing with false trial testimony (the jury essentially found that Respondent's proffered reasons for the termination were untrue).

The evidence, therefore, is sufficient to justify the jury's verdict that ARCO engaged in willfully discriminatory conduct undertaken in bad faith and deserving of punishment in the form of liquidated damages.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that this Petition should be granted and a Writ of Certiorari should issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

FELDSTEIN GRINBERG STEIN
& MCKEE

By: Stanley M Stein

Stanley M. Stein, Esquire
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Stanley M. Stein, Esquire do hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari was mailed to Jess Womack at 1500 Market Street, Philadelphia, PA this 19 day of December, 1986 by U.S. mail, postage prepaid.

Stanley M. Stein

Stanley M. Stein, Esquire